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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NOEL ANUAR AGUIRRE and JESUS  
EDUARDO ACOSTA,

Defendants and Appellants.

G039307, G039672

(Super. Ct. No. 05SF0271)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant Noel Anuar Aguirre.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant Jesus Eduardo Acosta.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr. and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

We conclude the trial court properly admitted gang expert testimony and did not violate Penal Code section 654 in sentencing the two defendants. (All statutory references are to the Penal Code.) Accordingly, we affirm.

## I

### FACTS

A jury found defendant Noel Anuar Aguirre guilty of two counts of attempted murder as charged in counts one and two of the information, found it true they were committed with premeditation and deliberation, found it true they were committed for the benefit of a criminal street gang, and found it true he intentionally and personally discharged a firearm in committing counts one and two. The jury also found Aguirre guilty of street terrorism as charged in count three.

The jury found defendant Jesus Eduardo Acosta guilty of two counts of attempted murder as charged in counts one and two. The jury found it to be true that counts one and two were committed with premeditation and deliberation, that both crimes were committed for the benefit of a criminal street gang, and that Acosta vicariously discharged a firearm for the benefit of a criminal street gang in committing both crimes. The jury also found Acosta guilty of street terrorism in count three.

The court sentenced Aguirre to a determinate sentence of nine years in prison and an indeterminate sentence of 50 years to life plus two life sentences. Acosta was sentenced to a determinate sentence of two years plus 50 years to life plus two life sentences.

On March 13, 2005, Tiffani Fryer lived in an apartment complex on Marguerite St. in Rancho Santa Margarita. On that day, Fryer was in custody, and she asked Matt Moody to watch over her apartment while she was gone. Fryer had a longtime friend named Carrie; she is not sure whether or not she also asked Carrie to go

to her apartment. She did not give either of the defendants permission to stay in her apartment. She also sent her friend, Todd Benson, to the complex to pay her rent.

On March 12, Fryer called her own apartment and briefly spoke with defendant Acosta. At that time, Fryer also spoke with Carrie who said “that everyone was cleared out of the apartment.”

Todd Benson testified Fryer was his girlfriend. On March 12, Fryer called him to tell him there were people in her apartment and asked him to clear them out. He went to the apartment about 1:00 o’clock in the afternoon. Carrie was there. With Carrie were two men. Benson said one was an “Hispanic male, medium build,” and possibly with some tattoos on his head. Benson stayed with the three for “at least a couple hours.” Benson asked them to leave and “they complied.” He “double checked the windows and the door and made sure everything was locked.”

Benson returned later that evening to the apartment. He saw one of the men “loitering around.” Benson instructed him to leave.

Around 7:00 o’clock in the morning of March 13, Moody drove to the apartment to check on it. He had received a phone call from Fryer the day before asking him to check on her apartment.

Aguirre opened the door for Moody. Acosta and two females were also in the apartment. Moody related what he said to Acosta: “I had told him that they needed to leave the apartment. That the owner of the apartment wasn’t — she wasn’t very happy about them being there. I told them at first that she was my — she was my cousin, I told them. And that I was here from Arizona. I lied to them to try to get them to leave. Told them I was here from Arizona to get whoever was in her house out of her house. And she wanted — she had asked me to come and do that.”

Aguirre told Moody they were taking over the lease. He and Acosta laughed, giggled and smirked at Moody. Acosta told Aguirre he was “down with his

homey” and “down for whatever” he wanted to do. Aguirre walked over to the door and locked it.

Aguirre then said, “We ain’t going nowhere, homes.” Moody said: “That was probably maybe 15 seconds or so before I was shot. Before I remember the gun coming out and looking down the barrel of the gun.” He said, “The whole thing happened so fast. And then I woke up in the hospital.”

Aguirre pulled out a semiautomatic handgun from his rear waistband and pointed it in Moody’s face. Aguirre shot Moody in the chest.

Moody related “the last thing that was said from Mr. Acosta to Mr. Aguirre right before I was shot. [¶] . . . [¶] I believe the word, I don’t know the Spanish meaning of the word or I’ve heard it throughout the years of my live. I grew up in, you know, in school and stuff with Hispanics, and in sports and stuff. Say like before you throw the ball ‘ponele.’ Throw it, or do it, or go ahead. It means something like that, I believe. I’m not positive.”

Tauni Smith came to court in a wheelchair having been paralyzed on March 13, 2005. She and Moody had planned to have breakfast together, and she went with him to the apartment that morning. When the gun was brought out, Moody said: “‘I didn’t mean to disrespect you,’” and added that he was sorry. Smith said Moody “fell like a rag doll on to Mr. Aguirre’s feet.” Smith jumped over Moody and was running toward the sliding glass door when she was shot in the back. After she was on the ground, she played dead when Aguirre “put the gun at my head.”

Jeff Launi is a police officer with the Santa Ana Police Department assigned to the gang detail within the crimes against persons unit. He testified both Aguirre and Acosta admitted they were members of the Santa Nita gang.

Launi gave several opinions. About the need for gang members to demand respect, he said: “Gang members, first of all, require respect. They demand it. If they

don't have respect or they don't maintain a level of respect, they will lose standing, stature, and what's the other term I'm looking for — within their own gang structure. [¶] And I have known of instances where a gang member was disrespected and he didn't stand up or answer that disrespect, and he was disciplined by his own gang for allowing himself to be disrespected.” He also said that fear and intimidation equate to respect among gangs.

Launi was given a hypothetical set of facts identical to the facts of this case, and then asked whether or not he had an opinion “whether the attempted murders were committed for the benefit of, in association with, or in furtherance of a criminal street gang.” His answer was “yes,” and he provided a lengthy explanation: “You have a — the described crime or crimes are committed in concert by two gang members. Two active participants of Santa Nita. [¶] I know things about Santa Nita. I know this gang is not resident to Mission Viejo, it's a resident to Santa Ana. So that would bring up other questions or issues with me. Why are they down there, primarily. [¶] Well, I'll address that now. There was alcohol containers or evidence of that found in the apartment. By information you gave me there was narcotics or suspected narcotics and narcotic paraphernalia found in the apartment. These individuals were found in the apartment when they weren't from there. They're from Santa Ana. [¶] The first issue with me, why are they there? This apartment to me, based on what you're telling me in the hypothetical, sounds like a crash pad. [¶] . . . [¶] Based on what I was told was found there and who was in this apartment. And I know that gangs and gang members operate out of these type of locations for various reasons. They use these locations as secondary places to operate out of or hang out in because they're not known in these areas because they're not from there, they're from Santa Ana. [¶] By what was found in there it looks like there was probably or very potentially there illegal activities going on in this apartment. Primarily I'm referring to the use of possibly drugs and narcotics there.

There were other people there you said that weren't identified, so there's multiple people in this apartment. Now, we have a male and female that go to this apartment, it sounds like maybe from the information in the hypothetical to find out what's going on there, who is there, something to that effect. [¶] There is some kind of a confrontation or altercation takes place. I believe you told me discussion became heated or words to that effect. [¶] There were statements made by one or more of the gang members, we're not going anywhere. Down for you homey. Whatever you're going to do, do it, or words to that effect you gave, you told me. That is classic backup. We talked about that. [¶] The rest of the bulk of this I would attribute to disrespect."

## II

### DISCUSSION

#### *Gang testimony*

Both defendants contend the trial court erred in admitting the testimony of the gang expert. They claim there was insufficient evidence the shootings were gang related, and that the expert testified about their subjective intents.

In addressing challenges to the sufficiency of evidence, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] "If

the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]” [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

“California law permits a person with ‘special knowledge, skill, experience, training, or education’ in a particular field to qualify as an expert witness [citation] and to give testimony in the form of an opinion [citation]. Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is ‘sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’ [Citation.] The subject matter of the culture and habits of criminal street gangs, of particular relevance here, meets this criterion. [Citations.]” (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.)

In *People v. Albarran* (2007) 149 Cal.App.4th 214, the reviewing court found some gang evidence that was extremely inflammatory and had no connection to the crime to be irrelevant and unduly prejudicial, but the court did not address whether there was sufficient evidence to support the gang enhancement allegations. (*Id.* at p. 228.) The court said: “[A]s general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. [Citation.] Consequently, gang evidence may be relevant to establish the defendant’s motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect.” (*Id.* at p. 223.)

Acosta contends Launi’s testimony was tantamount to expressing an opinion regarding his guilt “when he opined that the crimes were committed for the benefit of, in association with, or in furtherance of a criminal street gang.” He cites *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, for the proposition that it is

improper for an expert to give an opinion on the ultimate issue. The cases states: “Expert opinions which invade the province of the jury are not excluded because they embrace an ultimate issue, but because they are not helpful (or perhaps too helpful). ‘[T]he rationale for admitting opinion testimony is that it will assist the jury in reaching a conclusion called for by the case. “Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates” [Citation.]’ [Citations.] In other words, when an expert’s opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them.” (*Id.* at p. 1183.)

Here Launi testified that gang members have a need to maintain their standing by insisting on a high level of respect. In addition to Launi’s opinion, there was evidence from which the jury could infer respect to the defendants was not shown by the victims. For example, Smith testified that Moody apologized for being disrespectful immediately before he was shot.

Launi said alcohol, narcotics and paraphernalia were found in the apartment. He also described a hypothetical apartment such as the one involved in this incident as a crash pad of the type used by gangs as a secondary location. From this evidence, a jury could reasonably infer the apartment in this incident was a crash pad used by gangsters, and gang business was being conducted in the apartment.

Launi said the discussions about “down” and “homey” in the hypothetical question sounded like classic backup discussions used by gang members. From this evidence, combined with the testimony of Moody and Smith, a reasonable jury could conclude exchanges between Acosta and Aguirre were backup discussions between gang members.

We conclude there was reasonable, credible and solid evidence the shootings were done as part of gang activity. We also conclude the gang expert did not



intrude upon the jury's duty to decide the ultimate issues in this case. The hypothetical facts presented to the gang expert were properly rooted in the evidence presented at trial.

Even if Launi's expert testimony was improperly admitted, it is not reasonably probable defendants would have obtained a more favorable result without it. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendants are admitted gang members. They said they were claiming the apartment as their own. They conducted drug activity in the apartment. Their interactions with each other demonstrated they acted in concert and backed each other up; they interacted with each other as gang members do with words like "down" and "homey." The victims showed them disrespect, which is not tolerated by gang members. Under these circumstances, any potential error was harmless.

#### *Section 654*

Defendants contend the trial court erred in not staying their convictions of street terrorism pursuant to section 654. The Attorney General says their argument should be rejected because they committed the attempted murders and street terrorism with independent and distinct intents.

Section 654 requires that an act or omission that is made punishable in different ways by different provisions of the Penal Code may be punished under either of such provisions, "but in no case shall [it] be punished under more than one . . . ." This provision bars multiple punishment when a defendant is convicted of two or more offenses that are incident to one objective. (*Neal v. State of California* (1960) 55 Cal.2d 11; *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective of the actor*. If all of the offenses were incident to one objective, the defendant may be punished for any one of

such offenses but not for more than one.” (*Neal v. State of California, supra*, 55 Cal.2d at p. 19, italics added.)

A person who commits street terrorism and another offense may have simultaneous but independent intents. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 935.) Street terrorism requires proof a defendant willfully promoted, furthered or assisted in criminal conduct by gang members. (§ 186.22 subd. (a).) “The characteristics of attempted murder and street terrorism are distinguishable . . . .” (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) “In order to prove an attempted murder charge, there must be sufficient evidence of the intent to commit the murder plus a direct but ineffectual act toward its commission. [Citation.]” (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.)

“In contrast, section 186.22, subdivision (a), encompasses a more complex intent and objective. . . . [¶] Section 186.22, subdivision (a) punishes active gang participation where the defendant promotes or assists in felonious conduct by the gang. It is a substantive offense whose gravamen is the *participation in the gang itself*.” (*People v. Herrera, supra*, 70 Cal.App.4th at p. 1467, fns. omitted.) The *Herrera* court found the defendant’s conviction for street terrorism was divisible from his conviction for attempted murders. “Looking to Herrera’s intent and objective with respect to each crime [citation], we conclude that the sentence should stand. ‘[M]ultiple punishment . . . may be imposed where the defendant commits two crimes in pursuit of two independent, even if simultaneous, objectives. [Citations.]’ [Citation.]” (*Id.* at p. 1466.)

Both defendants argue *People v. Vu* (2006) 143 Cal.App.4th 1009, supports them. But this case is quite different from *Vu*, where the court stated “the acts of conspiracy and street terrorism constituted a criminal course of conduct with a single intent and objective.” (*Id.* at p. 1034.)

Here there is sufficient evidence defendants possessed two independent, simultaneous objectives in committing the attempted murders and street terrorism. The facts reveal Moody and Smith happened upon defendants in the midst of their gang activities. There is overwhelming evidence they intended to kill both Moody and Smith. And there is also overwhelming evidence they are members of the Santa Nita criminal street gang. The trial court properly sentenced the defendants.

#### *Consecutive sentence*

Aguirre contends the trial court failed to determine whether his sentence for street terrorism should run concurrent or consecutive. For that reason, he argues the abstract of judgment should be amended to state that term should run concurrently. The Attorney General responds that the trial court indicated its determination the term was to run consecutively.

In sentencing Aguirre for street terrorism, the court first sentenced him to two life terms for the attempted murders of Moody and Smith, and then stated: “In respect to count 3, 186.22 (a), the court is imposing the midterm, which is doubled by the Three Strikes law to four years.” After that, the court summed up Aguirre’s total sentence: “So, it would be 50 years to life, plus two life sentences. In which the defendant would be eligible after seven years on each. Plus a determinant sentence of four years, plus five years for the prior, which would be nine years.”

Section 186.22, subdivision (a) is “punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.” Since the midterm for street terrorism is two years, it is obvious that when the court summed up Aguirre’s total sentence, it indicated the sentence for street terrorism would run consecutively.

III  
DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.